1964

Robert Lee Jones v. Claudius D. Knutson and Salt Lake City Lines : Brief of Appellants

Utah Supreme Court

John H. Allen; Attorney for Respondent;
Rat, Quinney & Nebeker; Ramon M. Child; Attorneys for Appellants;

IN THE SUPREME COURT

of the

STATE OF UTAH

ROBERT LEE JONES
Plaintiff and Respondent

vs.

CLAUDIUS D. KNUTSON and
SALT LAKE CITY LINES, a
Utah corporation
Defendants and Appellants

No. 10163

APPELLANTS' BRIEF

Appeal from the Judgment of the Third
District Court for Salt Lake County
Hon. Marcellus K. Snow, Judge

RAY, QUINNEY & NEBEKER
Ramon M. Child
W. J. O'Connor, Jr.
300 Deseret Building
Salt Lake City, Utah
Attorneys for Appellants

BROWNING, ALLEN & MUKAI
John H. Allen
630 Judge Building
Salt Lake City, Utah
Attorneys for Respondent

TABLE OF CONTENTS

AUTHORITIES CITED

IN THE SUPREME COURT

of the

STATE OF UTAH

ROBERT LEE JONES
Plaintiff and Respondent

vs.

CLAUDIUS D. KNUTSON and
SALT LAKE CITY LINES, a
Utah corporation
Defendants and Appellants

No. 10163

STATEMENT OF THE KIND OF CASE

This is an action for personal injuries arising out of a collision between the plaintiff driving his automobile and the bus of defendant Salt Lake City Lines.

DISPOSITION IN LOWER COURT

The case was tried to a jury. From a verdict and judgment for the plaintiff, defendants appeal.

RELIEF SOUGHT ON APPEAL

Defendants seek reversal of the judgment, and a judgment of dismissal, or, failing that, a new trial.

STATEMENT OF FACTS

The facts in this case are relatively simple and should give rise to very little dispute. Plaintiff, Robert Lee Jones, brought suit for injuries allegedly resulting from defendant Knutson's operation of the bus of defendant, Salt Lake City Lines. Plaintiff claims that Mr. Knutson negligently drove the bus into the back end of a car being driven by plaintiff. The accident occurred November 2, 1961, at about four o'clock in the afternoon, while the bus was proceeding down Ninth South Street in Salt Lake City. The weather was clear and the street was dry (Tr. 2-3). At the place of collision Ninth South Street has a steep grade and consists of four traffic lanes, two running east and two west (Tr. 3). The street is approximately 62 feet wide and the outside lane (next to the curb) is 19 feet 8 inches wide, while the inside lane is 11 feet across (Tr. 10). The street was divided up the center by two yellow lines about 4 inches apart (Tr. 12). According to the investigating officer, the collision point was about 15 feet from the north curb of Ninth South Street, thus placing it in the outside lane (Tr. 10).

Just prior to the collision, Mr. Knutson was driving his loaded bus west on Ninth South and made a safety stop at Twelfth East Street to check his air brakes before proceeding down the hill immediately before him (Tr. 66). His brakes were in good order (Tr. 71). As he started up, he observed plaintiff's automobile stopped between the two lanes of traffic on the north of Ninth South. The door was open and a person later identified as the driver, Mr. Jones, was leaning out and picking up some object from the street. The driver then closed the

door and proceeded west down the hill, pulling slightly to the right and continuing in the outside lane; he then made an unexpected stop in a double parked position about half way down the hill toward Eleventh East Street. The bus was following plaintiff's car some 70 feet back and at a speed between ten and twelve miles per hour. Mr. Knutson had his foot on the air brake pedal all the way down the hill (Tr. 66, 67). As the bus and plaintiff's car proceeded down the hill from Twelfth East, they were traveling about the same speed (Tr. 74). The brake lights of the Jones' auto were going on and off while it went down the hill (Tr. 68). Marry Ferris, a passenger in the front seat of the bus, described plaintiff's second stop as "a sudden, unexpected stop" (Tr. 75). Plaintiff himself testified that he gave no arm signal for this second stop (Tr. 51). Upon observing that stop, the bus driver sounded his horn and put on his brakes with such force that Miss Ferris was thrown against the seat and "school books were thrown all over" (Tr. 75). Almost immediately thereafter, the collision occurred. At that time another vehicle was passing the bus heading west in the left lane and prevented Mr. Knutson from going around plaintiff's car (Tr. 67). Apparently the bus, in stopping, left no skid marks (Tr. 7). When it hit the rear end of the Jones' car, the bus was going about two miles per hour. It proceeded about two feet after the impact (Tr. 14, 68). Plaintiff made his second stop as his car drew opposite an automobile parked next to the curb. He therefore had brought his car to a stop in the traveled portion of the outside lane of traffic, then being used by the bus (Tr. 25, 27, 76).

The events surrounding plaintiff's operation of the car at the time of the accident were detailed in plaintiff's testimony and that of his passenger, Gayle Meier. Mr. Jones happened to be following a woman's car west down 9th South Street in the right hand lane of traffic when he saw some object fall from the top of her car. That was just below Twelfth East Street and at the time he was quite a ways behind her car. The lady driver stopped on the side of the road, alighted from her car and picked up an object from the street. Upon that occurrence, Jones gave an arm stop signal, stopped his car about one and one-half feet over the white line dividing the two west bound lanes of Ninth South Street, opened his left door and while sitting in the driver's seat, stooped down and retrieved the lady's shoe (Tr. 24). Jones then drove what he estimated as about fifty feet further down the hill, to a point alongside the lady's parked car, where his passenger friend, Mr. Meier, "reached across and handed her the shoe" (Tr. 25, 26.) Mr. Meir's recollection was that Mr. Jones first and second stops were a fifth of a block or less apart (Tr. 17).

About a minute to a minute and a half elapsed between Jones' first stop and the time the vehicles hit (Tr. 17). The shortness of the second stop is well indicated by Mr. Meier's testimony that he "was in the act of handing them to (the lady) Miss Warner who was in the parking lane, the extreme right area shown in the diagram, when the bus hit us in the rear . . ." (Tr. 16). Jones held his foot on the brake pedal all the way down the hill and while stopped to deliver the shoe (Tr. 25, 26). Jones never saw the bus at any time prior to the collision (Tr.

28). Just before the impact he heard the bus horn sound two or three times, and as he turned to look, the collision occurred (Tr. 25). Jones testified that his car had a large rear window and if he had looked into his rear view mirror, he could have seen the bus following him (Tr. 49). At the time, no cars were parked either in front or to the rear of the lady's parked car, so that Jones could have pulled over to the curb and stopped before delivering the shoe to the lady (Tr. 50).

The record contains evidence that at the time of the accident the brakes on the bus were inadequate to stop it after Mr. Knutson saw the Jones car make the last stop. Miss Ferris testified that the bus driver put on the brakes when Jones stopped, and "the bus was stopping but it couldn't stop in time. He hit the car" (Tr. 75). Mr. Knutson, just after the accident, told the investigating officer that he had "put on the brakes all the way as hard as they would go. It seemed like the bus wouldn't stop. The brakes wouldn't slide the wheels or stop it" (Tr. 4).

ARGUMENT

POINT I.

(A) THE TRIAL COURT ERRED IN DENYING DEFENDANTS' MOTIONS FOR A DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT, BECAUSE PLAINTIFF WAS NEGLIGENT AS A MATTER OF LAW AND HIS NEGLIGENCE WAS A PROXIMATE CAUSE OF THE DAMAGE SUFFERED BY PLAINTIFF.

(B) THE TRIAL COURT ERRED IN REFUSING DEFENDANTS' REQUESTED INSTRUCTION NO. 7 THAT PLAINTIFF WOULD BE NEGLIGENT AS A MATTER OF LAW IN FAILING TO GIVE A HAND SIGNAL PRIOR TO HIS STOPPING.

Appellants here contend that plaintiff's conduct as he proceeded down 9th South Street just before and up until the collision with the bus, constitutes contributory negligence as a matter of law.

Plaintiff testified that he gave no arm or hand signal for his second stop on 9th South Street (Tr. 51). Under the circumstances existing just prior to the accident, the flashing of the brake lights of the Jones car moving down the hill was not a legally sufficient notice that Mr. Jones was going to stop in the lane of traffic, double parked. The normal procedure for a driver traveling down a grade such as 9th South Street is to apply the brakes intermittently until the car reaches the bottom of the hill.

The applicable Utah statutes provide: (U.C.A. 1953)

> 41-6-69 (c) No person shall stop or suddenly decrease the speed of a vehicle without first giving an appropriate signal in the manner provided herein to the driver of any vehicle immediately to the rear when there is opportunity to give such signal.
>
> 41-6-70 *Signals—Method of giving—Signal lamps.*—(a) The signals herein required shall be given either by means of the hand and arm or by a signal of a type approved by the state road commission, * * *

41-6-103. Stopping, standing or parking—Prohibition as to specified places. (a) No person shall stop, stand or park a vehicle, except when necessary to avoid conflict with other traffic or in compliance with law or the directions of a police officer or traffic-control device, in any of the following places:

(12) On the roadway side of any vehicle stopped or parked at the edge or curb of a street.

When the facts of this case are closely examined, it becomes evident that plaintiff was guilty of contributory negligence on two counts: failure to give a proper stop signal, and stopping in the lane of traffic being used by the bus. Each of these neglectful acts contributed to the accident and each in itself is a bar to plaintiff's recovery against defendants.

Defendants' requested instruction No. 7, refused by the trial court, correctly states the law applicable where a driver fails to give a proper stop signal. That instruction reads:

"You are instructed that Utah law provides that no person shall stop or suddenly decrease the speed of a motor vehicle without first giving an appropriate signal to the driver of any vehicle immediately to the rear when there is opportunity to give such signal. In this regard, the mere visible light showing the application of the brakes is not compliance with Utah law but the giving of an appropriate signal in this regard would require the giving of a hand signal.

Therefore, if you find that the plaintiff in this action stopped or suddenly decreased the speed of his vehicle without first giving a hand signal to the

driver of the vehicle immediately to its rear and that the plaintiff further had an opportunity to give such a signal, then you will find that the plaintiff was contributorily negligent."

None of the Court's instructions contained the point of law raised by the above instruction No. 7. Thus the trial court withheld from the jury's consideration a material element in the determination of plaintiff's contributory negligence, and denied defendants the right to have their theory of the case presented to the jury on the facts before it.

We have emminent judicial authority to support the appellants' arguments.

The general rule, followed by the Utah Supreme Court, is that a driver's violation of a motor vehicle statute is negligence as a matter of law. In *North vs. Cartwright*, 119 Utah 516, 229 P. 2d 871, the Court had before it an action for injuries sustained by a minor while riding a motor scooter. The scooter had crossed over to the wrong side of the road just before the collision. Plaintiff was also carrying a passenger on his motor bike. The evidence established that the defendant was turning his car to the left in the proper lane at the time the scooter hit the defendant's automobile. The Supreme Court upheld the Trial Court's direction of a verdict for defendant for the reason that plaintiff was guilty of contributory negligence as a matter of law. The Court observed that plaintiff was guilty of violating two Utah statutes "upon which negligence in law may be predicated." Plaintiff was running his scooter on the wrong side of the highway

and was carrying a passenger contrary to the Utah law. The Court stated:

> "These statutes were promulgated for the protection of the public and to safeguard property, life and limb of persons using the highways from accidents of the type here involved. Violations of these statutes then constitute negligence in law. This doctrine of the law has been steadfastly adhered to by this court and generally in other courts throughout the United States."

The Court further found that plaintiff's violation of the statutory standards of care was a proximate contributing cause of the injury and therefore he is, "barred from recovery as a matter of law." The Court's definition is particularly applicable here to Mr. Jones' negligence. Quoting from *Farrell v. Cameron,* 98 Utah 68, 94. P 2d 1068, 1075, the Court stated:

> "Proximate cause is that cause which, in natural or continued sequence, unbroken by any new, intervening, efficient cause, produced the result complained of, and without which the damage would not have been sustained."

In *Morbey v. Rogers,* 122 Utah 540, 252 P. 2d 231, the Utah Supreme Court reaffirmed the rule that violation of a statutory duty resulting from the operation of an automobile constitutes negligence a matter of law, but made an exception for a thirteen-year-old boy who was riding a bicycle when struck by an on-coming car. The Court cited and approved *North v. Cartwright,* supra.

The Tenth Circuit Court of Appeals passed upon the above Utah statute on signaling for a stop, in the case of

United States vs. First Security Bank, 208 F. 2d 424 (CA 10th, 1953). There, the plaintiff brought suit against the United States under the Federal Tort Claims Act for injuries sustained in an accident involving three cars, one of which was a United States mail carrier. Vernon, a rural route mail carrier, was delivering mail during the day and slowed down and finally stopped to make a mail delivery. Vernon put on his brakes, but made no hand signal whatsoever. A truck pulling a house trailer behind Vernon, and of which he was aware, applied its brakes in response to the brake lights of the Vernon automobile and the house trailer swung over into the plaintiff's lane of traffic, causing the collision with the plaintiff's automobile. The plaintiff contended that the defendant, Vernon, was the cause of the accident and was negligent in failing to give an appropriate signal when he was stopping or decreasing the speed of his vehicle.

The Court, on page 429, stated:

> "The statute (U.C.A. 41-6-60c) required Vernon to give an appropriate signal before stopping or suddenly decreasing his speed. No hand signal was given. It is urged that the visible light showing application of Vernon's brakes complied with the statute. A fair inference to be drawn from the testimony of Mardis and his wife is that the brake light signal which was given by the Vernon automobile was simultaneous with its sudden decrease in speed. Under such circumstances, the signal was not effective and was not in compliance with the statute which provides that an appropriate signal must be given prior to stopping or suddenly decreasing the speed of a vehicle."

The Circuit Court (208 F. 2d 429) concurred in the trial court's finding that Vernon's negligence in so stopping was a proximate cause of the collision. The opinion states:

> "* * * Assuming that Mardis was negligent and that without such negligence the collision would not have occurred, it is equally true that without Vernon's negligence the collision would not have occurred."

In *29 A.L.R. 2d 5*, is an exhaustive annotation upon the subject of a sudden or improperly signaled stop. While the decisions there annotated present a diversity of opinion, the following summary statement by the author (page 12) is significant in our case:

> "The cases present little controversy as to the existence of a duty upon the part of the operator of a motor vehicle to first take reasonable observations to determine that the movement can be made with safety to others, before stopping or slowing his vehicle, and to give a proper signal or warning of his intention where others may be affected."

As the cases in the above annotation illustrate, a distinction is made, and rightly so, between an abrupt stop made because of an emergency and one not so caused. In our situation, Mr. Jones' second stop, made in the lane of traffic, was not the result of any emergency.

In the aforesaid *A.L.R.* discussion are a number of decisions holding that actuating the brake lights is not a sufficient stop signal to free the driver of the charge of negligence. The annotation, at page 31, states the rule thus:

> "But the fact that the stopping car was equipped with rear lights operating off the brakes has been held not necessarily to relieve the driver of negligence in stopping suddenly ahead of another driver, even though the relevant statute provided for the giving of stop signals by an electrical or mechanical device."

A California decision passing upon a stop signal statute like Utah's law is *Donahue v. Mazzoli,* 80 Pac. 2 743. The plaintiff's car ran into defendant's truck as the vehicles were proceeding in the same direction at about 18 miles per hour. The plaintiff had been behind the truck for some time prior to the collision. Defendant had abruptly stopped his truck in the line of traffic and plaintiff had failed to stop in time to avert the rear-end collision. The accident happened in broad daylight and the weather was clear and the streets were dry. The evidence established that the plaintiff's car was about 16 feet back when the defendant stopped. Defendant's truck was equipped with a signal light "approved by the Department of Motor Vehicles of California" and was in good working order. Defendant maintained not only that he had given an arm signal but that because of the signal lamp on his car he was not required to give a hand signal. He relied upon the California Code which contains the identical words of the Utah statute as to approval of the signal device by the Motor Vehicle Department.

The court ruled that the use of the signal light did not absolve defendant from negligence. Said the court:

> "* * * Under all circumstances the defendants were bound to use reasonable care in the operation of the truck. To that end they were bound to

> comply with the provisions of the law (secs. 544 and 545, supra) regarding signals. But those sections prescribe cumulative duties and do not lessen the obligations of the defendants under general law. . . . Under the common law and under the statute . . . they were bound to so operate their truck as to abstain from injuring the person or property of another. Furthermore, under section 505 of the Vehicle Code, St. 1935, p. 175, they were inhibited from operating their truck in a reckless manner. * * *"

A case pertinent to our fact situation in certain respects is *Dunaway v. Cade* (La) 39 So. 2d 148, where the plaintiff ran his bicycle into the rear of the defendant's car as it unexpectedly stopped in the thoroughfare. The case does not indicate whether the statute provides for the giving of a stop signal by a light.

The defendant driver was not faced with any emergency but voluntarily stopped his automobile without giving a hand signal. The court held, among other things, that the use of the brake light signal did not excuse the driver from giving the proper hand signal. The defendant testified that he had not seen the approaching vehicle in his rear view mirror prior to the accident. On that point, the Court had this to say:

> "* * * Also, Cade was negligent for if he looked in his rear view mirror and did not see young Dunaway, he should have seen him, and if he did not look, he should have looked, either in the rear view mirror or in some other manner, prior to stopping his automobile in the lane of traffic on the pavement without any signal except possibly a stop light warning.

"For these reasons, we are of the opinion that the judgment of the District Court in holding that the negligence of Cade was a proximate cause of the accident is correct."

POINT II

THE TRIAL COURT ERRED IN GIVING THE JURY AN INSTRUCTION UPON THE THEORY OF LAST CLEAR CHANCE

By Instruction No. 9, the Court, over the objection of defendants, presented to the jury the doctrine of last clear chance as follows:

INSTRUCTIONS NO. 9

Under certain circumstances a plaintiff is entitled to a verdict against a defendant even though the plaintiff be guilty of contributory negligence. This rule of law that thus permits a negligent plaintiff to recover judgment is known as the doctrine of last clear chance. If you determine that the plaintiff was in fact guilty of contributory negligence, you should then consider whether or not the doctrine of last clear chance is applicable to this case . The doctrine of last clear chance is applicable only if you find from a preponderance of the evidence that each of the following six propositions is true.

1. That the plaintiff was in a position of danger.

2. That he was by reason of inattention or lack of proper alertness totally unaware of the peril that threatened him.

3. That the defendant actually saw the plaintiff and knew of his perilous position.

4. That the defendant then realized or by the exercise of due care should have realized that the plaintiff was unaware of the danger to himself.

5. That at the time the defendant saw the plaintiff and knew of the peril to him and realized or should have realized that the plaintiff was oblivious to the danger, he then had a clear opportunity to avoid the accident by the exercise of ordinary care and with his then existing ability. There must have been an actual opportunity existing at that moment for the defendant to avoid the accident. Also, it must have been a fair, clear opportunity and not just a bare possibility of doing so.

6. That the defendant then negligently failed to avail himself of that clear opportunity and as a proximate result the plaintiff was injured.

If you find that each of the above six propositions is true, the doctrine of last clear chance is applicable to this case, and the plaintiff is entitled to a verdict in his favor even though you find him guilty of contributory negligence. If you find that anyone of the above six propositions is not true, the doctrine of last clear chance has no application and cannot be invoked by the plaintiff.

Defendants took their exception to the above instruction, and raised the point again in their motion for a new trial, which the lower Court denied. Appellants here assert that the last clear chance doctrine has no application to the facts of our case. Let us examine the law to be applied in resolving this issue. In *Anderson v. Bingham & Garfield Railway Company,* 117 Utah 197, 214 P.2d 607,

the Utah Supreme Court accepted the definition of the last clear chance doctrine as adopted by the *Restatement of Torts,* and quoted Section 480 thereof:

> "A plaintiff, who, by the exercise of reasonable vigilance could have observed the danger created by the defendant's negligence in time to have avoided harm therefrom, may recover if, but only if, the defendant
>
> (a) knew of the plaintiff's situation, and
>
> (b) realized or had reason to realize that the plaintiff was inattentive and therefore unlikely to discover his peril in time to avoid harm, and
>
> (c) thereafter is negligent in failing to utilize with reasonable care and competence his then existing ability to avoid harming the plaintiff."

The comment on clause (c), found under Sec. 479 is as follows:

> "(f) Antecedent lack of preparation. * * * If the defendant, after discovering the plaintiff's peril, does all that can reasonably be expected of him, the fact that his efforts are defeated by antecedent lack of preparation or a previous course of negligent conduct is not sufficient to make him liable. All that is required of him is that he use carefully his then available ability. Thus, if A, a railroad engineer, discovers a wayfarer helpless on a highway crossing which he has entered without taking precautions to see whether a train was approaching, and A thereafter does all which is then in his power to stop the train before it hits the traveler, the traveler may not recover against

> the railroad although his position was seen in ample time to stop the train had the brakes not been negligently permitted to be in bad condition. So too, if a railroad train is exceeding the statutory speed limit in approaching a level crossing but the engineer does not see the plaintiff's helpless peril on the crossing in time to stop the train, the fact that the train could have stopped in the distance between the two points had it been going at the lawful speed is not enough to make the defendant liable to the negligent plaintiff."

The facts of the above case are briefly as follows: The plaintiff was injured in a railroad crossing accident and alleged that the train had defective brakes in violation of the Federal Safety Appliance Act. Under one of the court's instructions, the jury was entitled to find that the defendant had a last clear chance to avoid injury to the plaintiff. A verdict of no cause of action was returned. The plaintiff appealed, contending that the instructions to the jury were erroneous in several particulars, thereby clouding and confusing the issue whether the defendant had a last clear chance. On appeal, the Supreme Court of Utah held that an instruction on last clear chance was not applicable. The court, on page 200, stated:

> "There is a diversity of judicial opinion in this country as to the question presented by the fact situation of this case. Stated succinctly the question is this: Does a precedent act of negligence on the part of a defendant, whether it be of omission or commission, whereby the defendant has rendered himself powerless to avert an accident after discovering that it is impending, make the defendant liable to a plaintiff who has through his own negligence exposed himself to peril?"

Justice Wolfe then concluded:

> "After a careful review of the cases in which the question before us has arisen and the reasoning employed by the courts to justify their positions, we are firmly convinced that there is no logical or justifiable basis why, under the facts of the instant case, the question of last clear chance should have been submitted to the jury. Equality in treatment to plaintiffs and defendants demands that the doctrine of last clear chance be not invoked unless there is evidence that with the *means at hand* the defendant clearly could have avoided injury to the plaintiff."

In reaching its conclusion in the Anderson case the Court observed:

> "Even Missouri under its broad humanitarian doctrine has not seen fit to hold a defendant liable who was unable to avoid injury to a negligent plaintiff because of the defendent's own antecedent negligence. The humanitarian doctrine 'seizes upon the situation as it then exists * * *. The ruling that antecedent negligence of a defendant may be taken into consideration in determining whether he was negligent under the humanitarian rule would in many cases permit an unwarranted recovery for primary negligence (antecedent negligence) through the elimination, under the guise of that rule, of the defense of contributory negligence.' State ex rel. *Fleming v. Bland,* supra, 15 S.W. 2d 801."

The Utah Court also commented that it "cannot under the thin guise of the last clear chance doctrine compare degrees of negligence * * *. A driver (of a vehicle) upon the highway does not carry with him an 'anticipatory last

clear chance obligation', ie. he need not drive so as to create a last clear chance opportunity for others."

The above statements by Judge Wolfe are very pertinent to defendants' situation in the instant case. If Mr. Knutson, the bus driver, was driving at an excessive speed as he came down 9th South, or if his brakes were such that he could not stop in the distance existing between him and the plaintiff's car when Jones made the final stop, such a circumstance, whether negligence or not, does not carry over to the time when the peril arose, ie, when Mr. Jones made his second stop.

Later Utah decisions have closely analyzed the doctrine of last clear chance. A review of those Supreme Court cases shows there is no legal justification for applying that doctrine to the facts of the present case.

In *Compton v. Ogden Union Ry. & Depot Co.*, 235 P.2d 515, 120 Utah 453, the decedent, represented by plaintiff, was struck and killed by defendant's engine while she was walking along the tracks in the Ogden yards during the daylight hours. She was using a path which had been availed of by employees of various companies for some time. The evidence indicated that the engine was proceeding about 10 miles per hour and stopped within 50 feet after striking decedent who was walking with her back to the engine. The train gave no audible signal and none of the train crew was in a position to observe ahead on the side of the track the decedent was then using. The plaintiff appealed from a judgment dismissing the case, and one ground was the lower court's failure to submit to the jury the question of last clear chance.

After deciding that the deceased was guilty of contributory negligence as a matter of law, the Court proceeded to discuss the last clear chance doctrine and particularly Sections 479 and 480 of the *Restatement of Torts,* Vol II. The Court correctly concluded that Section 479 applies to the situation where the plaintiff is in a position of "inextricable peril" and therefore the defendant alone has the last clear chance to avert the accident. Section 479 provides that the negligent plaintiff may recover "if, immediately preceding the harm, (a) the plaintiff is unable to avoid it by the exercise of reasonable vigilance and care * * *". The Court stated that the rule of Section 479 is applicable "only if the plaintiff's negligence has come to rest and plaintiff is thereafter unable by the exercise of reasonable care to avoid the injury herself". The decision then held that decedent was not in a situation covered by that Section. Two of the Court's illustrations of inextricable peril show the difference between that situation and our set of facts. In one case the boy was lying on the railroad tracks either asleep or unconscious. In the other example, the decedent had been injured and was lying between the tracks unable to escape when the train passed over him. The Court made this pertinent observation: "we have never held that a mere continuance of the same inattentive negligence created a situation of inextricable peril. * * *"

> "It follows, thus, that the doctrine of last clear chance does not include cases in which a plaintiff has the physical and mental ability to avoid the risk up to the moment of the harm. His 'continuing' negligence, as it is sometimes called, continues to insulate the defendant's negligence, and the or-

dinary rule of contributory negligence governs the case."

The Compton case then proceeded to review with approval Section 480 of the said *Restatement of Torts,* quoted earlier in this brief. The Court stated that plaintiff may recover under that section from a defendant who knows of plaintiff's situation and realizes, or has reason to realize, that plaintiff is inattentive and unlikely to discover his peril in time to avoid harm, and defendants *thereafter* is negligent in failing to use ordinary care with the means at his disposal to avoid harming him. For plaintiff to recover under the facts before the Court in the Compton case, it would be necessary, stated the Court, that plaintiff first prove defendant knew the decedent was in a position of peril. The Court ruled that defendant did not know of decedent's peril, and affirmed the lower Court's judgment in favor of defendant.

The Utah Supreme Court, in *Cox v. Thompson,* 254 P. 2d 1047, 123 Utah 81, had under consideration a suit for wrongful death of a pedestrian struck by defendant's automobile while crossing the street. The accident occurred at night on a poorly lighted highway and the evidence showed that the deceased was walking into the path of the car when hit. While the facts are not in line with the situation of our present case, the law announced by the Court is a guide in applying the last clear chance doctrine. The trial court had directed a verdict for defendant because decedent was found to be contributorily negligent as a matter of law. The Supreme Court upheld the trial court's refusal to submit the case to the jury on a theory of last clear chance. Defendant in that case saw what

appeared to be a shadow, step into the street directly into the lights of defendant's car. Defendant swerved his car sharply in an attempt to avoid the decedent. The testimony was that defendant was traveling about 35 miles an hour at the time. In holding that the last clear chance doctrine did not apply to the facts in the case the Court stated:

> "The evidence must be such as would in all probability reasonably support a finding that there was a fair and clear opportunity, in the exercise of reasonable care, to avoid the injury. It would not be sufficient that it appear from hindsight that by some possible measure the defendant by the 'skin of his teeth' could have avoided the injury. See *Morby v. Rogers,* 122 Utah 540, 252 P. 2d 231."

The Court followed the language of the *Compton* case, supra, in these words:

> "Thus the matter was properly withheld from the jury if the evidence taken in the light most favorable to the plaintiff, would not reasonably and clearly support a finding that (a) defendant knew of decedent's situation of danger, and (b) realized or had reason to realize that plaintiff was inattentive and unlikely to discover his peril in time to avoid harm, and (c) the defendant was thereafter negligent in failing to utilize with reasonable care and competence his then existing ability to avoid harming decedent."

The Court applied statistics obtained from a publication of the Utah State Highway Patrol and determined that in view of the distance the defendant first noticed the decedent, which varied up to 57 feet, "it seems clear

that defendant could not have avoided the impact by the application of his brakes".

> "The brakes were applied. A reasonable mind could not conclude that defendant was negligent in failing to utilize his then existing ability to avoid harming decedent, if he had any such ability. It was as reasonable, if not more reasonable to turn left as to turn right. Defendant seemingly did all in his power to avoid harming decedent. Certainly there is no evidence that defendant had a last clear chance to avoid harming decedent."

Another Utah decision which supports appellant's position here that the last clear chance doctrine should not be applied, is *Charvoz v. Cotrell,* 12 Ut. 2d 25, 361 P.2d 516. There, the decedent was struck by defendant's automobile at the time decedent was proceeding at night in the crosswalk at the intersection of 17th South and 19th East Streets, in Salt Lake City. The weather was clear and the road was dry. The lower court's verdict was for defendant and the trial court denied a motion for a new trial. The Supreme Court ruled that the last clear chance doctrine has no application to the facts of the case. Appellant contended that defendant "could have avoided the accident by either sounding the horn of the automobile or swerving to the right." His argument was that the case fell directly within the provisions of the aforesaid Section 480, *Restatement of Torts.* The uncontradicted testimony established that defendant was traveling at about 30 miles per hour when he first saw the pedestrian's situation some 60 to 65 feet ahead of him. Defendant did not blow his horn or turn aside but did immediately apply his brakes. His car took about two seconds to cover the dis-

tance from where he first observed decedent to the point of impact. Reviewing this testimony, the Supreme Court commented:

> "It is possible that the decedent could have extricated himself from his peril if warned by the sound of a horn, and it is possible that the defendant could have avoided the accident had he swerved to the right. However, the doctrine of last clear chance contemplates a last clear chance, not a last possible chance. The doctrine implies thought, appreciation, mental direction and the lapse of sufficient time to effectually act upon the impulse to save another from injury."

Except for the fact in the present case that Mr. Jones was in an automobile instead of standing in the path of the bus, our fact situation is quite similar to that of the Charvoz case. From the testimony of Miss Ferris, the bus passenger, and the uncontradicted testimony of Mr. Knutson, the bus driver, it appears that he was going between 10 and 12 miles per hour when Jones made the second "sudden, unexpected stop", and that the bus was then about four car lengths back, that is, 70 feet or less. We therefore may safely conclude that the bus required up to four seconds to cover the distance from where Knutson saw the plaintiff's second stop to the point of the collision. We have the well established fact that the bus hit the Jones car almost immediately after the sounding of the horn and while the car passenger, Meier, was handing the shoe across to the lady in the parked car. Those facts establish that the bus driver did not have the clear chance or the time for appreciation and mental direction required in the ruling of the Supreme Court in the *Charvoz* case, supra. As that decision aptly phrased the point:

> "It would not be sufficient that it appear from hindsight that by some possible measure the defendant by the 'skin of his teeth' could have avoided the injury."

It must be noted and kept in mind at all times that the doctrine of last clear chance, as enunciated in the above quoted *Restatement of Torts* and by the Courts, is based on the major premise that the plaintiff is in a position of danger. Blashfield, *Cyclopedia of Automobile Law and Practice*, Volume 4, Part 2, Section 2803, states the general rule to be "that, in order to invoke the last clear chance doctrine, the injured person seeking its benefit must have been in obvious and imminent peril." Now, in our case, plaintiff's "peril" did not arise, if at all, until he had made his second stop; and, as heretofore indicated, Mr. Knutson, the bus driver, then had no clear opportunity or chance as those terms are defined by the law, to avert the collision. His situation at that time was made more difficult because his way to the right of the Jones' automobile was blocked by the parked car and his way to the left was foreclosed by the passing westbound car.

Furthermore, plaintiff's negligence continued up until the time of the impact, just as decedent's negligence did in the Utah case of *Compton v. Ogden Union Railway*, supra, where the train overtook decedent as she walked along the track.

As this Court observed in *Anderson v. Bingham & Garfield Railway Co.*, supra;

> "The doctrine of last clear chance is a limitation on the defense of contributory negligence; the doctrine should not be extended further in its

application than it can be supported by cogent reasoning."

The lower court's Instruction No. 9 lists as one of the requirements of the doctrine of last clear chance, a jury finding that "plaintiff was in a position of danger." Because the instruction is indefinite, we cannot determine with any certainty what position of plaintiff the court intended to cover. But regardless of the wording of the instruction, the court committed reversible error in giving it.

Viewing the evidence most favorably for respondent, it establishes at most that Mr. Jones was not in a position of peril until he made his second, final stop prior to the collision. That stop occurred in the lane of traffic ahead of the bus, beside a parked car, and without any arm signal from the driver. When that unexpected situation abruptly confronted Mr. Knutson, the bus driver, he had no fair and clear opportunity to avoid the accident. Mr. Jones himself, up until the last moment, had as good an opportunity as did Mr. Knutson to avoid it. From the time the defendant realized, or should have realized the plaintiff's position of peril, the defendant did all that reasonably could be required of him to avoid harming the plaintiff; the burden was on the plaintiff to prove otherwise and that, he failed to do.

CONCLUSION

Appellants respectfully submit that the facts and the law of this case establish that plaintiff was guilty of contributing negligence as a matter of law, and that appellants are entitled to a judgment of reversal, and dismissal of plaintiff's suit.

Appellants also urge that the trial court's refusal to give defendants' requested instruction No. 7 (on plaintiff's failure to give a hand signal) constitutes reversible error.

Appellants further submit that the lower court's instruction No. 9 containing the last clear chance doctrine also constitutes error and *in itself* justifies a reversal and a new trial for appellants.

Respectfully submitted,

RAY, QUINNEY & NEBEKER

R. M. CHILD

W. J. O'CONNOR, JR.

Attorneys for Appellants